No. 10743.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AARON FERER & SONS, a copartnership,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLEE.

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Statement of the Case.

This is an appeal from a judgment by the United States District Court for the Southern District of California, Central Division, which ordered that appellant take nothing by its action and that, as prayed in appellee's counterclaims, the written contract between appellant and appellee be reformed in the manner therein provided [Vol. I, pp. 157 and 158]. The jurisdiction of the court below depended upon diversity of citizenship, the action having been removed from the Superior Court of the State of California. 28 U. S. C. A., Secs. 71 and 72 (Judicial Code, Secs. 28 and 29) [Vol. I, pp. 7-18].

The action was brought upon a written contract between the parties dated January 17, 1941. By its first cause of action, appellant sought declaratory relief and specific performance by way of injunction; and by its second cause of action, appellant sought damages for the alleged breach of the contract [Vol. I, pp. 19-25]. The contract, a copy of which was attached as an exhibit to the amended complaint [Vol. I, pp. 26-34], provided for the sale by appellee to appellant of certain equipment and facilities located on land owned by appellee near Casmalia, in Santa Barbara County. As consideration, appellant paid appellee the sum of $22,000.00, and appellant agreed to perform certain work at its own cost, which included among other things, "the dismantling, removal and disposition of all equipment and facilities to be purchased by Buyer" thereunder. Subsequent to the execution of the contract, appellant asserted the right thereunder to remove the casing from the oil wells at Casmalia and to abandon such wells. Appellee notified appellant that the contract did not cover or relate to the casing in the wells and that appellee would not consent to appellant's removal of any thereof [Vol. I, pp. 51-54]; and this action was then commenced.

After a hearing on appellee's motion to dismiss, the court below sustained the same as to the first count of the amended complaint on the ground that the contract was for the sale and delivery of personal property and that under the circumstances, appellant was not entitled to declaratory or equitable relief [Vol. I, pp. 35-41]. Appellant assigns as error here such action by the court below in so far as it denied appellant declaratory relief.

After the ruling on the motion to dismiss, appellee filed its answer denying that the subject matter of the contract

included any of the casing installed in any of the oil wells, and asserting that the subject matter was limited to the surface facilities located on the land, which denial raised the issue of the proper interpretation of the contract; and by separate defenses, appellee sought by counterclaim to reform the contract to limit the subject matter thereof to the surface equipment and to provide for an express exclusion of the casing in the wells. By separate counts, reformation was sought first, on the ground of mutual mistake, and second, on the ground of a mistake on the part of appellee which was known or suspected by appellant [Vol. I, pp. 41-54].

Subsequently, appellant made its motion for summary judgment [Vol. I, pp. 55-70], which motion was thereafter heard by the court below on the affidavit of Morris Ferer, one of the copartners of appellant [Vol. I, pp. 59-65], and upon the affidavits of F. I. McGahan, H. H. Kelly and Harold Davis, employees of appellee [Vol. I, pp. 83-98], and upon the depositions taken by appellee of Morris Ferer, David Zeidenfeld, a former employee of appellant, and T. H. Clements, who had a one-third interest in appellant's profits and losses under the contract [Vol. II, pp. 616-939]. Appellee also made a motion for summary judgment in its favor on the two counts for reformation contained in appellee's counterclaim, which motion was based upon the same affidavits and depositions [Vol. I, pp. 107-110]. Thereafter, the court below made its order denying the appellant's motion for summary judgment [Vol. I, p. 112]. The court below also made an order denying appellee's motion for summary judgment; but in so doing, the court expressly stated that relief was denied upon the sole ground that issues of fact

had been raised [Vol. I, pp. 113 and 114]. On this appeal, appellant cites as further error the denial of appellant's motion for summary judgment.

The court then set the case for trial on the merits, with an order admitting in evidence at the trial, the affidavits and depositions theretofore considered on the motions for summary judgment [Vol. I, pp. 113 and 114].[1] The case was tried upon two issues, first, the issue of interpretation of the contract as raised by the complaint and answer thereto; and second, the issue of reformation as raised by appellee's counterclaim and appellant's reply thereto [Vol. I, pp. 175-183 and p. 253; Vol. II, p. 496].[2]

The court thereafter made its decree reforming the contract to exclude expressly the casing in the wells from its subject matter [Vol. I, pp. 157 and 158]. In so doing, the court left undetermined the issue of the interpretation of the contract.[3]

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[1]The order admitting the affidavits and depositions in evidence made the affiants and deponents subject to cross-examination and reserved proper objections to questions in the depositions. At the trial such order was modified to the extent that Zeidenfeld's deposition was not admitted as testimony, although it was nevertheless used for impeachment purposes [Vol. I, p. 144].

[2]At the conclusion of the presentation of testimony, the court requested that the two issues be briefed separately, *i. e.*, that appellant originally brief the issue raised by the complaint and that appellee originally brief the affirmative issues raised by the answer [Vol. II, pp. 610-612].

[3]"Finding No. 30. In view of the foregoing findings, it is unnecessary to make any finding concerning the proper construction or interpretation of said written contract dated January 17, 1941, either on its face or in the light of the surrounding circumstances" [Vol. I, p. 154].

Statement of Facts.

The land at Casmalia had been owned by appellee, Richfield Oil Corporation, and its predecessors, for a considerable number of years. At the time of the contract between the parties, there were various oil wells on the Casmalia property which had been drilled subsequent to 1917 and had produced oil until 1925, when production was discontinued because of unprofitable operations. At the time production was discontinued, the field had not been fully depleted, had several million barrels of oil in it, and at the time of trial, adjacent properties were still being produced at the rate of 500 barrels per day. [Vol. I, pp. 462-464, and Vol. II, p. 473.]

Since one of the principal issues for determination at the trial was the intention of Richfield concerning the exclusion from the sales contract of the casing in such wells, it is pertinent, before discussing the negotiations between the parties leading up to the contract, to state briefly the actions taken by Richfield and its predecessors with respect to the Casmalia property prior to the negotiations. Commencing in 1929, the management of Richfield and of its predecessor companies had made a constant study of the problem of reopening the field for the production of oil; reports had been made upon the problem; the management had visited the field with the thought of opening up not only the Casmalia field, but also adjacent fields in the vicinity; and recommendations that the property presented good opportunities for profitable operation had been made in 1940 by Mr. Montgomery, the manager of Richfield's Production Department, to the regular executive meetings of the Richfield management. He advised the management that the reasons for the unprofitable

operations in 1925 which had caused the property to be shut in were the use of old, obsolete pumping equipment and the use of steam for pumping purposes; that the oil was very heavy and was produced by the injection of distillate in the wells and the oil was then driven down to a great mass of refining equipment where the distillate was distilled off; and the refining equipment was also used to break the viscosity of the oil in order to get it into a pipeline. In his recommendations, Montgomery proposed a new method of operation which would decrease operating costs and which would use gas engines or pumping jacks to eliminate the use of steam. [Vol. I, pp. 330-348, and Vol. I, p. 463, to Vol. II, p. 487.]

Early in 1940, after the matter had been recommended at one of the executive meetings, Montgomery instructed Mr. Kelly, the manager of Richfield's Purchasing Department, to obtain a contractor to remove the derricks, tubing and rods from the wells. The reasons for such removal were that the derricks, having been there for many years, were toppling over and were in a hazardous condition, and would not be used in the future plan of operation, and Richfield felt that the rods and tubing in the wells were in a precarious condition because of the corrosive oil and water in the wells and that the rods and tubing might damage the wells. Montgomery instructed Kelly that the casing in the wells was not to be tampered with at all and that if the contractor found any tubing parted or stuck in the hole, he was not to "fish" it out in order that the casing might not be disturbed [Vol. II, pp. 465-467]. These instructions culminated in the so-called Anderson contract dated March 12, 1940 [Defendant's Exhibit A, Vol. I, pp. 265-278]. Paragraph 4 of the Anderson con-

tract sets forth the work to be performed by the contractor in the removal of the derricks, tubing and rods and contains provision for protection of the wells and the duty on the contractor's part not to remove any of the casing. In Anderson's work under such contract, the wells were not abandoned and the casing was left therein and the wells were each capped at the surface in order that they might in the future be reopened and re-entered for the production of oil [Vol. I, p. 91].

During the summer of 1940, Richfield decided at one of the executive meetings to make a combination sale of refinery and production equipment at Casmalia [Vol. II, pp. 470 and 471]; and Kelly was instructed to sell the surface equipment [Vol. I, pp. 340 and 341]. This decision was made after Montgomery advised the management that the surface or production equipment, including the pipelines and boilers, had been there for many years and had probably deteriorated and would not be required in the proposed scheme of future operations [Vol. II, pp. 469-479]. The matter of arranging for the proposed sale was delegated by Richfield's Production and Purchasing Departments to Mr. McGahan, Richfield's supervisor of storehouses, and to Mr. Davis, one of the buyers in Richfield's Purchasing Department. McGahan's duties included the notification of prospective bidders when Richfield determined to sell any of Richfield's old or salvage equipment [Vol. I, p. 83]. His instructions from the Purchasing and Production Departments were that the surface equipment at Casmalia, with certain exceptions, was to be sold and that he was to take prospective bidders to Casmalia and show them the equipment [Vol. I, pp. 375-377]. Davis' duties included arranging preliminary

negotiations for the sale by Richfield of salvage equipment [Vol. I, p. 93]. His instructions from Mr. Kelly were to make arrangements to sell the surface equipment at Casmalia [Vol. I, pp. 258-9, and p. 283].

Thereafter, negotiations between various representatives of appellant and Richfield occurred over a period of weeks until execution of the written contract on January 17, 1941. These negotiations consisted of various conversations between Messrs. Ferer, Clements and Zeidenfeld, representing appellant, and Messrs. McGahan, Davis and Kelly, representing Richfield.

McGahan had two conversations with Zeidenfeld, who had on various prior occasions discussed with McGahan the purchase by appellant of salvage equipment belonging to Richfield. At the first conversation McGahan told Zeidenfeld that Richfield was planning on taking bids for the sale of "surface equipment" located at Richfield's Casmalia property; that he did not have specific information at that time as to what items of equipment were located on the property; and he inquired of Zeidenfeld whether appellant would be interested in submitting a bid [Vol. I, pp. 83 and 381 and 382]. At a second meeting with Zeidenfeld during the last week of November or the first week of December, McGahan informed him that he had more specific information concerning the available equipment and he showed Zeidenfeld penciled memoranda and estimates [Defendant's Exhibit B, Vol. I, pp. 387-397]. They discussed the items on the memoranda and McGahan informed Zeidenfeld that his estimate of the over-all ton-

nage of the equipment to be sold was 1500 tons, which consisted of 920 tons of pipelines and 580 tons of other surface equipment including boilers, pumps, valves, fittings and refinery equipment [Vol. I, pp. 85 and 383-386]. During the interval between McGahan's two conversations with Zeidenfeld, McGahan had a conversation with Morris Ferer; and in reply to Ferer's inquiry as to what Richfield had for sale at Casmalia, McGahan told him that the equipment to be sold was "surface equipment" which generally included tanks, boilers, pipelines, valves and fittings, and that he had no specific inventory of the equipment at that time, but would have a better idea after he had made an investigation of the property. He told Ferer that he would be glad to meet him at the Casmalia property and show him what equipment was available for sale [Vol. I, pp. 84 and 380 and 381].

Prior to January 17, 1941, McGahan had two or three conversations with Clements concerning the sale and at one of them, he told him that the "surface equipment," with certain exceptions, would be sold [Vol. I, pp. 97 and 98; 381-383].

During December, 1940, Ferer and Clements made a trip to Casmalia and made a personal investigation of the equipment there. Subsequently, appellant submitted its bid to Richfield by letter dated December 10, 1940 [Plaintiff's Exhibit 2, Vol. I, pp. 215 and 216]. Appellant's bid was accepted by letter of Richfield to appellant dated January 2, 1941 [Plaintiff's Exhibit 3, Vol. I, pp. 218 and 219]. Subsequently, on January 8, Messrs. Ferer and

Clements met with Davis in the latter's office, at which time appellant's check for $22,000.00 was delivered to Davis, and during which meeting a memorandum was prepared by Davis [Plaintiff's Exhibit 1, Vol. I, pp. 220 and 221]. At that meeting, additional terms of the arrangement were discussed and agreed to [Vol. I, pp. 226-234, and p. 309]. During the same conversation, they discussed the six large storage tanks at Casmalia (two of which had capacities of 55,000 barrels each) which were excluded from the sale; and Clements asked Davis why Richfield did not sell the tanks as a part of the transaction. In the presence of Clements and Ferer, Davis called Montgomery on the telephone and discussed the matter with him; and at the conclusion of the conversation, Davis told Ferer and Clements that the tanks were not to be sold because the Production Department wanted to retain them for storage purposes in the event the wells were reopened [Vol. I, pp. 251 and 252; 285 and 286; and Vol. II, pp. 473 and 474].

At the conclusion of the conversation in Davis' office, Davis telephoned Mr. Paradise, one of the attorneys for Richfield, and a meeting was then held in the latter's office for the purpose of discussing the preparation of a written contract. Messrs. Ferer, Clements, Davis, McGahan and Paradise attended the meeting. At that meeting, the exclusion of the gas line was also discussed. Davis pointed out to Messrs. Ferer and Clements on a large map of the premises (a copy of which map was attached as an exhibit to the contract) the gas line from the super-

intendent's house to one of the wells on the property; and Davis told them that Richfield desired to exclude such line from the sale in order that the superintendent's house (also excluded from the sale) could continue to receive gas from such well. He also said that if there was not gas in such well sufficient to serve the superintendent's house, it might also be necessary to exclude gas lines running to other wells on the property in order to insure a gas supply to the superintendent's house. [Vol. I, pp. 88, 96, 300-302, 305-311 and 367-368]. The map attached to the contract contains the following legend printed in red at the terminus of the excluded gas line leading to Well No. 36: "And any extensions of gas line necessary to furnish gas to Duncan's house." [Vol. I, p. 149, and Vol. II, pp. 897 and 898.]

Neither the casing in the wells nor the abandonment of any of the wells was ever mentioned during any of the conversations or negotiations [Vol. I, pp. 60, 86-7, and 96].

H. H. Kelly, who executed the contract on behalf of Richfield, did not participate in any of the negotiations, and met Messrs. Ferer and Clements only on January 8, 1941, when they delivered the $22,000.00 check to Richfield [Vol. I, p. 322].

The contract was executed on January 17, 1941, and the controversy concerning whether or not the casing in the wells was included in the subject matter of the contract did not arise until several months later.

Summary of Argument.

(1) The court below correctly ruled that appellant was not entitled to a summary judgment.

(2) The court below correctly sustained appellee's motion to dismiss the first cause of action of the amended complaint by which appellant sought declaratory relief and specific performance.

(3) Any error by the court below in sustaining the motion to dismiss the first count of the amended complaint or in denying appellant's motion for summary judgment did not affect the substantial rights of the parties.

(4) The findings of fact of the lower court are supported by substantial evidence; the findings are sufficient to support the conclusions of law and the judgment; and the conclusions of law sustain the judgment.

(5) The proper construction and interpretation of the contract in the light of surrounding circumstances is that the subject matter thereof was limited to equipment and facilities located on the surface of the land and did not include the casing in any of the oil wells.

ARGUMENT.

I.

The Court Below Correctly Ruled That Appellant Was Not Entitled to a Summary Judgment.

The major portion of appellant's brief (pp. 17-77, inclusive) is devoted to an argument that the trial court erred in denying its motion for summary judgment. The motion was heard on the affidavits of Messrs. Ferer, McGahan, Davis and Kelly, and on the depositions of Messrs. Ferer, Clements and Zeidenfeld.

Appellant's argument largely concerns the weight to be given to the testimony of the witnesses as contained in the affidavits and depositions, and thus discloses a misunderstanding of the nature and purpose of the procedure for summary judgment. The function of the trial court upon the hearing of a motion for summary judgment is not to weigh the evidence or to try the case on its merits, but rather to determine whether there is any genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. Rule 56C of the Federal Rules of Civil Procedure.

A motion for summary judgment is properly denied, and indeed must be denied if genuine and substantial issues are presented.

> *Acadian Production Corporation of Louisiana v. Land,* 136 Fed. (2d) 1, C. C. A. 5, 1943. (In this case the court mentioned that no depositions or affidavits were present which made the facts clear, but that the pleadings themselves raised important issues.);

Campana Corporation v. Harrison, 135 Fed. (2d) 334, C. C. A. 7;

Ramsouer v. Midland Valley Railroad Co., 135 Fed. (2d) 101, C. C. A. 8.

See also, *Kent v. Hanlin,* 35 Fed. Supp. 836, where the court said on page 837:

> "However, a summary judgment should not be entered if the pleadings raise any genuine issue of fact material to the dispute between the parties. In other words, such a judgment is improper unless a trial would be a useless form. *Saunders v. Higgins,* D. C., 29 F. Supp. 326. Therefore, if an answer raises a material issue of fact, there is an insurmountable obstacle in the way of a summary judgment, no matter how a motion for the same may be bolstered by affidavits."

Can it possibly be said that the pleadings, affidavits and depositions before the court showed both that there was no genuine issue as to any material fact and that appellant was entitled to a judgment as a matter of law? It seems so obvious that the burden of such a showing can not possibly be maintained by appellant that a detailed discussion of the contents of the affidavits and depositions would occupy the time of this Court unnecessarily. However, the following instances are illustrative of sharp issues of material facts which arose if full credence be given to the sole evidence offered by appellant, to-wit: the affidavit of Morris Ferer [Vol. I, pp. 58-66].

(1) Ferer's affidavit in effect said that no one at any time prior to the execution of the written contract said anything whatsoever with respect to limiting the subject

matter of the sale to equipment or facilities on the surface of the land. This was denied in McGahan's affidavits [Vol. I, pp. 83-88 and 97-98].

(2) Ferer's affidavit stated that if Richfield intended that the subject matter of the sale be limited to equipment on the surface and that the subject matter was not to include the casing in the wells, Ferer had no knowledge of such intention or any suspicion thereof whatsoever. Davis' affidavit described two separate conversations which occurred during the negotiations, either of which was sufficient to give Ferer both knowledge and suspicion of Richfield's intention:

> A. The conversation between Messrs. Ferer, Clements and Davis on January 8 during which Davis explained the reason for the exclusion of the six large storage tanks.[4] [Vol. I, p. 94.]
>
> B. The conversation prior to the execution of the written contract at which Davis explained to Ferer and Clements the reason for the exclusion of the gas line to one of the wells and the extension of the line to other wells.[5] [Vol. I, pp. 88 and 96.]

The foregoing illustrations of conflicts of testimony are sufficient answer to appellant's insistence on pages 46-52 of its brief that the allegations of Mr. Ferer's affidavit were undenied, must be accepted as true and that they compelled a summary judgment in favor of appellant as a matter of law.

In asserting error in the lower court's ruling on the motion for summary judgment, appellant incorrectly as-

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[4]See Statement of Facts, pp. 9-10 of this brief.

[5]See Statement of Facts, pp. 10-11 of this brief.

sumes that the question of whether the contract should be interpreted to include or exclude the casing in the wells was not an issue before the court in its determination of the motion for summary judgment. Appellant bases such claim (App. Br. pp. 23-28) on Judge Hollzer's memorandum [Vol. I, pp. 38-40] which accompanied his order denying Richfield's motion to dismiss the complaint, and in which he expressed certain views concerning the meaning of the contract. Those views were expressed by Judge Hollzer before Richfield had filed its answer to the complaint, which answer places in issue the question of whether the subject matter included the casing. Judge Hollzer's opinion was preliminary only; and at the outset of the trial, he indicated that the consideration of the evidence developed at the hearings on the motion for summary judgment gave him doubt as to the correctness of the opinion he had theretofore expressed concerning the interpretation of the contract [Vol. I, pp. 175-6].[6] That the

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[6]"When we came to consider the respective motions for summary judgment, the record on which included affidavits and depositions, evidence was developed which I think presents another aspect to the case. I have in mind particularly that the record as it was presented in support of these motions for summary judgment discloses circumstances surrounding or attending the execution of the contract. And, while I do not wish to be understood as having reached a final conclusion in the matter, I must say that I am impressed with this situation, namely, that a question has been raised in my own mind respecting the proper construction of this contract in the light of the circumstances attending and leading up to its execution as disclosed by the present record. And I feel that the question of what should be the final construction of the contract should not be considered as foreclosed. While, prior to the submission of these motions for summary judgment and upon a consideration of the complaint itself, we did express certain views as to the meaning of the contract, I feel that I ought to point out to counsel that I am not convinced as to the correctness of that ruling in the light of the circumstances leading up to and attending the execution of the contract as developed by the present record [Vol. I, pp. 175-6].

construction of the contract was considered by Judge Hollzer to have been an issue at the time of the hearing on the motion for summary judgment is clear from Judge Hollzer's statements at the opening of the trial.[7]

With some seriousness, appellant asserts (App. Br. pp. 32-34) that Richfield's answer and counterclaim had no standing in court and were sham because verified by a person who, it is charged, had no personal knowledge of the allegations. This charge may be disregarded inasmuch as appellant made no motion in the lower court to strike the pleading on that ground, in all probability because of appellant's familiarity with Rule 11 of the Federal Rules of Civil Procedure which provides that "except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."

Appellant asserts that the contract could not have been reformed because of lack of proof of a prior oral agreement between appellant and Richfield. The authorities cited on pages 11 and 12 of appellant's brief do not re-

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[7]"While I shall still allow further time for the presentation of evidence (on the issue of the construction of the contract), such additional evidence as plaintiff may wish to offer, I think it may fairly be said that the issues which were raised in connection with plaintiff's' motion for summary judgment still remain issues in the case. Otherwise, we would have granted the motion. The fact that we denied the motion would indicate that they are still to be tried . . . But the fact still remains that when your (appellant's) motion for summary judgment was denied, in spite of the previous ruling respecting the construction of the contract, I think it may fairly be construed to indicate that issues of fact respecting the execution of that contract had been raised in connection with your motion for summary judgment which had to be tried. I think among those issues of fact was what were the circumstances leading up to and attending the execution of the contract." (Parenthetical matter added.) [Vol. I, p. 182.]

quire that the oral understanding of the parties be a formal one; the sole requirement being that it is necessary to ascertain the intention of the parties to the transaction. *California Civil Code,* Sec. 3399, provides:

> "When contract may be revised. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express *the intention of the parties,* it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." (Emphasis ours.)

The quotation by appellant from the first case cited by it, *Fidelity Guaranty Fire Corporation v. Bilquist,* 108 Fed. (2d) 715, C. C. A. 9, refers to an "oral or *implied* agreement which the written contract was intended to express" (emphasis ours). In the second case cited by appellant, *Columbian National Life Insurance Co. v. Black,* 35 Fed. (2d) 571, the Circuit Court of Appeals for the Tenth Circuit reversed the judgment of the lower court on the ground that the lower court improperly denied reformation; and the Circuit Court of Appeals, after discussing the contention of the respondent concerning the necessity of a prior agreement, determined upon facts much weaker than those present in the instant case that a sufficient prior agreement to permit reformation was present.

Appellant's argument that no prior oral agreement existed must be based solely upon the fact that there was no express statement during the conversations, which constituted the negotiations for the contract, that the casing in

the walls was not to be included in the subject matter of the transaction. It is not a requisite to a decree of reformation that the parties in their oral negotiations should have used the exact words or language which are being inserted in the contract by the reformation decree;[8] and accordingly, it is not necessary that there be proof of an express statement during the oral conversations that the casing in the wells was not included in the subject matter of the sale.

This same contention of the absence of a prior agreement was urged by appellant in the court below at the hearing on the motion for summary judgment. The court rejected such contention with language so appropriate that appellee adopts Judge Hollzer's statement here quoted from the transcript of the hearing, notwithstanding that such transcript is not a part of the record:

> "The Court: I think the argument has made it fairly clear that the defendant's position on the subject of the oral contract, in substance, is this: That negotiations which were carried on between the representatives of the respective parties, extended over a period of some weeks, and that out of those negotiations we may, and should, draw certain conclusions, particularly that the fair inferences to be deducted from those negotiations are that the parties intended to enter into a contract of the character pleaded, as you say, in the form of legal conclusions, in the defendant's counter-claim, and that when the parties came to incorporate those conclusions, reached as a result of negotiations, though they had in mind one

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[8] *F. P. Cutting Co. v. Peterson*, 164 Cal. 44, at pages 47 and 48; 127 Pac. 163.

kind of an agreement, both sides knew, or had reason to know, that the written agreement was intended to merely put into definite, tangible form, that which the parties had arrived at as a result of some weeks of negotiations. Have I epitomized your contention in that respect?

Mr. Paradise: Yes.

The Court: When you (plaintiff's counsel) ask for the bill of particulars of the oral contract, I am wondering whether anything more can be said. In other words, if the theory of the defendant is that this oral agreement is based, not upon what was said at some particular hour, or some particular day of a particular month or year, but rather, you must take into consideration the series of conversations involving a number of individuals, and when you analyze them in their entirety, then you come to the conclusion that orally the parties determined to put into writing the particular understanding, such as that recited in the counter-claim, but, through inadvertence or mutual mistake, or, if you please, the mistake of one of the parties, which the other knew was being made, the wording of the written contract failed to conform to what the parties had orally said to be the terms of the written contract.

Mr. Krasne: I presume that is their contention.

The Court: Isn't that your theory?

Mr. Paradise: Exactly."[9]

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[9]Page 73, line 14, to page 74, line 25, of "Reporter's Transcript of Argument for Summary Judgment or for Bill of Particulars (Partial)," as reported by Reynolds & McClain, Official Shorthand Reporters, U. S. District Court.

The negotiations between the representatives of the respective parties took place over a period of several weeks and during such period there were several extensive conversations. These negotiations were of such nature that the terms of the purchase and sale arrangement which the parties intended to enter into can be ascertained readily. Even appellant will not challenge that prior to the execution of the written contract on January 17, 1941, the representatives of the parties had discussed the purchase by appellant and the sale by Richfield of certain producing and refining equipment and facilities at Casmalia; that the nature of the equipment and facilities had been discussed; that the price of $22,000.00 had been agreed upon; and that there had been discussions of the nature of the work to be performed on the property by appellant. The only matter which was not specifically discussed was whether the equipment and facilities which had been listed in the preliminary memoranda prepared during such negotiations as "tanks, pipe, valves, fittings, buildings, boilers"[10] also included an additional unlisted item, to-wit, the casing in the oil wells on the land. The failure on the part of the representatives of both parties to mention the casing specifically cannot justify ignoring the fact that the parties, in their negotiations, had arrived at an agreement. The representatives of Richfield had no reason to

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[10]This same list, with certain changes following it, appears in both appellant's offer dated December 10, 1940 [Plaintiff's Exhibit No. 2, Vol. I, pp. 215-16], and Richfield's acceptance dated January 2, 1941 [Plaintiff's Exhibit No. 3, Vol. I, pp. 218-19].

mention the express exclusion of the casing. They knew that the subject matter of the sale was "surface equipment" and appellant's representatives had been so informed. In addition, Davis had in effect told Messrs. Ferer and Clements that Richfield intended to retain the wells and the casing cemented therein by his statements on January 8, 1941: first, that the storage tanks were to be retained for use in connection with future production operations; and second, that it was necessary to reserve gas lines to one well and perhaps to others to insure a sufficient gas supply to the superintendent's house.

Furthermore, appellant did not intend, either during the negotiations or at the time of the execution of the contract, to purchase under the contract the casing in the wells, or to perform the abandonment work on the wells in the manner required by law which would be necessary in connection with the removal of the casing therefrom. The court below so found in Finding No. 26 [Vol. I, p. 154] which was based on the testimony in Clements' deposition [Vol. II, pp. 797-807].[11]

Accordingly, the existence of a prior oral agreement, sufficient for the purpose of reformation, is clearly shown.

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[11]This matter of the intention of the appellant is discussed more fully on pages 46 to 50 of this brief in connection with appellant's attack on Finding No. 22.

II.

The Court Below Correctly Sustained Appellee's Motion to Dismiss the First Cause of Action of the Amended Complaint by Which Appellant Sought Declaratory Relief and Specific Performance.

The order of the court below that the motion to dismiss the first count of the amended complaint be sustained without leave to amend [Vol. I, p. 41] was based upon Judge Hollzer's memorandum of conclusions [Vol. I, pp. 38-41] which stated that appellant was not entitled either to declaratory or equitable relief.

That appellant misapprehended the nature of Judge Hollzer's ruling is clear from the statement in appellant's brief that "It therefore is plain that Count I was dismissed because the court concluded that no substantial controversy between the parties existed . . ." (App. Br. p. 78). Judge Hollzer's opinion states specifically the grounds for his denial of declaratory or equitable relief:

> "It further appearing from the affidavit of one H. H. Kelly, filed herein on behalf of defendant, and from the statement made by defendant's counsel in open court, that defendant has notified plaintiff that the former contends that it did not sell to plaintiff said casing, also contends that plaintiff is not entitled to remove said casing, and has also notified plaintiff that defendant intends to and will prevent plaintiff from removing said casing . . .
>
> "The Court further concludes that the damages arising from such breach of contract pertain to the sale and delivery of personal property, and that plaintiff is not entitled to declaratory or equitable relief herein." [Vol. I, p. 40.]

Assuming appellant successfully established that the subject matter of the contract included the casing in the wells, appellant would not have been entitled to specific performance either by way of injunctive relief or otherwise, and Judge Hollzer so held.

Specific performance was properly denied for the following reasons:

(1) The contract pleaded in the complaint was a contract for the sale of personal property and there was no showing in the complaint that the casing therein referred to had any special or unique value.

California Civil Code, Sec. 3387;

Emirzian v. Asato, 23 Cal. App. 251, 255 to 257; 137 Pac. 1072;

Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 435 to 437; 297 Pac. 73;

LeMoyne Ranch v. Agajanian, 121 Cal. App. 423; 8 Pac. (2d) 1055.

(2) The contract provided for the performance of a succession of acts continuous in their nature, performance of which could not be consummated by one transaction and which required supervision and direction and demanded special knowledge, skill and judgment.

Poultry Producers, etc. v. Barlow, 189 Cal. 278, 281, 287 to 289; 208 Pac. 93;

Pacific Etc. Ry. Co. v. Campbell-Johnston, 153 Cal. 106; 94 Pac. 623;

Sheehan v. Vedder, 108 Cal. App. 419, 427; 292 Pac. 175.

(3) The contract provided for the rendition of personal services.

California Civil Code, Sec. 3390;

Poultry Producers, etc. v. Barlow, 189 Cal. 278, 281, 287 to 289; 208 Pac. 93;

Coykendall v. Jackson, 17 Cal. App. (2d) 729; 62 Pac. (2d) 746;

Hill v. Waiting Mining Co., 87 Cal. App. 297, 301; 261 Pac. 1115;

Peterson v. McDonald, 13 Cal. App. 644, 648; 110 Pac. 465.

(4) Inasmuch as the contract would not be specifically enforceable against appellant, there was no mutuality of remedy.

California Civil Code, Sec. 3386;

Poultry Producers, Etc., v. Barlow, 189 Cal. 278, 281, 287 to 289; 208 Pac. 93;

Hupp v. Lawler, 106 Cal. App. 121; 288 Pac. 801;

Moore v. Heron, 108 Cal. App. 705, 709; 292 Pac. 136;

Sheehan v. Vedder, 108 Cal. App. 419, 427; 292 Pac. 175.

Nor was appellant entitled to declaratory relief for the following reasons:

(1) The trial court has discretion whether or not to grant declaratory relief. The parties to a case should not be required to try their rights piecemeal and the trial court will deny declaratory relief when it would not accomplish a full and complete determination of all issues.

Declaratory relief is properly denied when it appears that it will not be effective in settling the alleged controversy or where a declaratory judgment would serve no useful purpose or when it is not necessary or proper under all of the circumstances.

Aetna Casualty & Surety Co. v. Quarles, et al., 92 Fed. (2d) 321, at pp. 325 and 326. C. C. A. 4, 1937;

Angell et al. v. Schram, 109 Fed. (2d) 380, C. C. A. 6, 1940;

Delno v. Market Street Railway Company, et al., 38 Fed. Suppl. 341, D. C. Cal. 1941 (Decision by Judge St. Sure);

Ohio Casualty Insurance Co. v. Murphy, 28 Fed. Supp. 252, D. C. Ky. 1939;

Zenie Bros. v. Miskend, 10 Fed. Supp. 779, D. C. N. Y. 1935;

Alfred Hofmann, Inc. v. Knitting Machines Corporation, 37 Fed. Supp. 578, D. C. Del. 1941;

State Farm Mutual Automobile Insurance Co. v. Hugee, 32 Fed. Supp. 665, Dist. Ct. So. Carolina 1940 (Affirmed 105 Fed. (2d) 298);

Anderson on Declaratory Judgments, pp. 176-177;

Borchard on Declaratory Judgments, p. 108.

A declaratory judgment would have served no useful purpose in this proceeding. Even if appellant had been successful in establishing that the contract included the casing in the wells, no full or complete determination of

all issues between the parties would have been accomplished by a declaratory judgment to that effect inasmuch as it was apparent that any obligation to sell the casing in the wells was not specifically enforceable and any determination of whether appellant was entitled to damages and the determination of the amount of damages, if any, would have required further litigation.

(2) Judge Hollzer's memorandum [Vol. I, p. 40] referred to the affidavit of H. H. Kelly which disclosed that Richfield had theretofore notified appellant that it had not sold the casing in the wells, that appellant was not entitled to remove the casing and that Richfield intended to and would prevent appellant from removing the casing. This affidavit filed by appellee in connection with its motion to dismiss was properly considered by the court below in determining whether it would exercise its discretion in permitting declaratory relief.

Delno v. Market Street Railway Company, et al., 38 Fed. Supp. 341, D. C. Cal. 1941;

Mutual Life Ins. Co. of New York v. Brannen, 31 F. Supp. 123, D. C. Iowa 1940.

When a plaintiff in reality seeks to obtain primarily, if not exclusively, consequential relief as distinguished from a declaration of rights, the cause of action is not one for declaratory relief. This is particularly true when an action is brought upon a contract the obligations of which have been breached prior to the commencement of the ac-

tion, in which event the cause of action is primarily for consequential relief.

Delno v. Market Street Railway Company, et al., supra;

Brix v. People's Mutual Life Insurance Co., 2 Cal. (2d) 446, 37 Pac. (2d) 448, at p. 449;

Standard Brands of California v. Bryce, et al., 1 Cal. (2d) 718, 721, 37 Pac. (2d) 446;

Orloff v. Metropolitan Trust Co., 17 Cal. (2d) 484, 110 Pac. (2d) 396;

Fritz v. Superior Court, 18 Cal. App. (2d) 232, 63 Pac. (2d) 872.

It appeared from the affidavit of H. H. Kelly so referred to in Judge Hollzer's memorandum that if the subject matter of the contract properly included the casing in the wells, Richfield had theretofore breached the contract and that appellant's remedy was limited to damages.

III.

Any Error by the Court Below in Sustaining the Motion to Dismiss the First Count of the Amended Complaint or in Denying Appellant's Motion for Summary Judgment Did Not Affect the Substantial Rights of the Parties.

The duty of this Court to disregard formal or technical errors and determine a matter on appeal upon the substantial rights of the parties is contained in Judicial Code, Sec. 269, as amended by Act of February 26, 1919, C. 48, 40 Statutes 1181 (28 U. S. C. A., Sec. 391). The pertinent portion of that statute is as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Campbell v. United States, 12 Fed. (2d) 873, 877 (C. C. A. 9, 1926), Certiorari denied 273 U. S. 722, 71 L. Ed. 859;

Shuman v. United States, 16 Fed. (2d) 457, 458 (C. C. A. 5, 1927), and cases cited therein;

Fidelity and Casualty Co. v. Glenn, 3 Fed. (2d) 913, 915 (C. C. A. 4, 1925);

Norfolk Southern R. Co. v. Talbott, 190 Fed. 737, 738 (C. C. A. 4, 1911);

Martin v. Brown, 294 Fed. 436, 440 (C. C. A. 8).

If this Court determines that the judgment of the trial court is properly sustained by its findings and conclusions and that the findings are supported by the evidence, it is apparent that the correct result has been reached and that any error in the rulings on the motion to dismiss or the motion for summary judgment has not been prejudicial to appellant.

IV.

The Findings of Fact of the Lower Court Are Supported by Substantial Evidence; the Findings Are Sufficient to Support the Conclusions of Law and the Judgment; and the Conclusions of Law Sustain the Judgment.

Appellant's claim of the absence of a prior agreement is briefly argued again in proposition IV (App. Br. p. 109) which asserts that the findings are insufficient to support the conclusions of law or the judgment, and in proposition V (App. Br. p. 110) which asserts that the conclusions of law do not sustain the judgment. These two propositions are stated most perfunctorily and are based upon the sole asserted ground of the absence of any finding by the court below of a prior agreement. This same statement was made on page 75 of appellant's brief. The plain answer to this repeated assertion is that it is untrue.

The court's finding No. 3 [Vol. I, p. 145] sets forth the oral agreement which was made by the parties prior to January 17, 1941. Finding No. 4 states: "To evidence such agreement, plaintiff and defendant executed a written contract dated January 17, 1941 [Plaintiff's Exhibit 4]." Finding No. 5 states the specific matter respecting which the contract dated January 17, 1941, did not truly express

the agreement or intention of the parties. It is not apparent how a trial court could frame clearer findings of a prior agreement. In making findings Nos. 3-5, the court below was aware of and rejected the argument made to it by appellant that there was no oral agreement.[12] Notwithstanding that appellant has challenged the sufficiency of practically every finding of the court (App. Br. pp. 82-109), no challenge is made to finding No. 3; nor did appellant propose any amendment to finding No. 3, although it did suggest amendments to most of the findings [Vol. I, pp. 124-133].

There remains to be considered appellant's proposition III which challenges the sufficiency of the evidence to support the findings. Before discussing the individual findings, however, certain observations should be made concerning the legal principles applicable thereto.

On pages 14 and 15 of its brief, appellant cites authorities in support of the rules concerning presumptions and burden of proof to the effect that it is presumed that the written instrument expresses the true intention of the parties; that the presumption is in favor of the correctness of the written instrument; and that the burden of proof is on the party who seeks reformation to show that the instrument does not express the intent of the parties. The authorities so cited by appellant merely establish the tests to be used by the trial court in weighing the evidence before it on the issue of reformation of a written contract.

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[12]The court's opinion which accompanied the findings, conclusions and judgment expressly recites: "It further appearing that plaintiff contends . . . that defendant has failed to establish any oral agreement to conform to which said written contract can be reformed." [Vol. I, p. 117.]

After the trial court has considered the evidence and testimony before it, and has made its determination, the appellate court will not decide as to the weight of the evidence where there is a conflict, or examine the evidence to determine where the preponderance lies, but will limit its inquiry to a determination of whether there is evidence tending to support the findings. The true rule is stated in *Speer v. Kittle Manufacturing Company,* 117 Cal. App. 717, 4 Pac. (2d) 575, where the appellate court, in affirming the trial court's judgment reforming a contract, said on pages 718-719:

> "It is contended by the appellant that the evidence is insufficient to sustain a judgment of reformation of the contract in this: That in such actions to justify a reformation, the evidence must be clear and positive, leaving no room for doubt. Among other cases the appellant cites those of *Burt v. Los Angeles O. G. Assn.,* 175 Cal. 668 (166 Pac. 993); *Hochstein v. Berghauser,* 123 Cal. 681 (56 Pac. 547); *Luning v. Brooks,* 1 Cal. Unrep. 29; *Home & Farm Co. v. Freitas,* 153 Cal. 680 (96 Pac. 308); which are to the effect that the proof in actions for reformation of a written instrument must be clear and positive. While this is undoubtedly the rule, yet as said in *Capelli v. Dondero,* 123 Cal. 324, 328 (55 Pac. 1057), in an action to reform a deed: 'The principal question raised by appellant is that the evidence does not support the findings. It is true, as appellant contends, that evidence warranting the reformation of a deed must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt; and unless the proofs come up to this standard, equity will withhold relief. But these are rules for the government of the trial court, and are not

controlling in this court where findings find support in the evidence. (*Ward v. Waterman*, 85 Cal. 502 (24 Pac. 930).) This court cannot enter upon an examination of all the evidence to determine where the preponderance lies. Upon questions of fact its province is to determine whether there be evidence tending to support the findings, and it cannot decide as to the weight of the evidence where there is a conflict.' (*Hochstein v. Berghauser,* 123 Cal. 681 (56 Pac. 547); *Myerstein v. Burke,* 193 Cal. 105 (222 Pac. 810); *California Packing Corp. v. Larsen*, 187 Cal. 610 (203 Pac. 102).)

"Under the foregoing rule it is our duty to ascertain if the findings of the trial court granting reformation of the contract, are sustained by the evidence. If so, then we cannot weigh the evidence to ascertain its preponderance, (*Capelli v. Dondero, supra.*)"

In *Nelson v. Meadville,* 19 Cal. App. (2d) 68, 64 Pac (2d) 1116, the court said on pages 71 and 72:

"Although the rule is that in order to justify a court in reforming, voiding or canceling an instrument on the ground of mistake or fraud, the proof of mistake or fraud must be clear, convincing and satisfactory to the court, yet a mere conflict of testimony as to the mistake or fraud does not necessitate a denial of relief. (*Hutchinson v. Ainsworth*, 73 Cal. 452 (15 Pac. 82, 2 Am. St. Rep. 823); *Wilson v. Moriarity, supra; Sullivan v. Moorhead, supra.*) And the decision of the trial court upon such conflict of evidence is conclusive upon this court. (*Brison v. Brison,* 90 Cal. 323, 334 (27 Pac. 186).) The question of a mistake or fraud was the issue between the parties, and the trial court found, upon the conflict of evidence before it, that the instruments

had been executed as the result of such mistake and fraud. We cannot say from the evidence in the record that the court was not justified in making such findings."

See, also:

Hercules Gasoline Co. v. Security Ins. Co., 122 Cal. App. 499, 10 Pac. (2d) 128.

This Court has often stated the same rule as applicable to challenged findings of fact.

The Hermosa, 57 Fed. (2d) 20, at p. 24, C. C. A. 9, 1932;

National Federal Insurance Co. v. Scudder, 71 Fed. (2d) 884, C. C. A. 9, 1934;

The Bergen, 64 Fed. (2d) 877, C. C. A. 9, 1933;

McCullough v. Penn. Mut. Life Ins. Co. of Philadelphia, 62 Fed. (2d) 831, C. C. A. 9, 1933;

Clements v. Coppin, 61 Fed. (2d) 552, C. C. A. 9, 1932;

Olympic Salt Water Company v. Shipowners' and Merchants, Tugboat Company, 48 Fed. (2d) 49, C. C. A. 9, 1931;

Standard Oil Co. v. Shipowners' & Merchants' Tugboat Co., 17 Fed. (2d) 366, C. C. A. 9, 1927.

The conclusiveness of findings of the trial court is not changed in any respect by the circumstance that the contract was prepared by the attorney for the party seeking reformation. The language of the court in *Moore v. Vandermast,* 19 Cal. (2d) 94; 119 Pac. (2d) 129, quoted by appellant (Appellant's Brief pp. 14 and 15) refers solely to the same requirement of "clear and convincing

evidence" mentioned above, and does not establish any additional requirement for reformation in cases involving the preparation of the contract by an attorney for the party seeking such relief. Compare *Los Angeles Co. v. New Liverpool Co.,* 150 Cal. 21, at pp. 25-28; 87 Pac. 1029.

In its brief appellant has divided the findings into two groups, those of ultimate facts and those of evidentiary facts. On pages 83 and 84 of its brief it discusses those findings which it classifies as ultimate facts. Appellant does not attack any of such findings of ultimate facts other than to state: "It is important and noteworthy that by none of these findings did the court find that the parties ever entered into an oral contract prior to the execution of the written contract." As stated above, finding 3 is an express finding of such prior agreement made prior to January 17, 1941.

Appellant's only challenge is to specific findings which appellant declares are evidentiary findings only. Before proceeding to a discussion of these findings, it should be pointed out that even if appellant's attack upon such findings were successful, a reversal of the judgment would not be warranted because the judgment is still sustained by the unchallenged findings of ultimate facts. The rule is recognized that findings of probative or evidentiary facts will not control, limit or modify the findings of ultimate facts, or tend to establish that the ultimate facts were found against the evidence unless the ultimate findings are necessarily based on the probative findings and are completely overcome.

> *Fitzpatrick v. Underwood* (1941), 17 Cal. (2d) 722, 727; 112 Pac. (2d) 3.

In *Gregg v. Manufacturers Bldg. Corp.,* 134 Cal. App. 147; 25 Pac. (2d) 1014, the court said on page 152:

> "The trial court made findings on all of the material issues. It also made the findings now attacked by the defendant. But the latter findings are but findings of probative facts. *The findings on the ultimate facts support the judgment. Those findings may not be ignored because findings on probative matters were also made.* (Rankin v. Newman, 107 Cal. 602 (40 Pac. 1024, 41 Pac. 304).)" (Emphasis ours.)

Finding No. 8. In finding No. 8, challenged by appellant at pages 84-92 of its brief, the court found that neither Richfield nor any of its employees intended that any of the wells at Casmalia be abandoned or that any casing be removed from the wells or that there be sold to the appellant any of the casing in any of the wells. The court found further that casing cannot safely be removed from a well without complying with the requirements of the California Division of Oil and Gas regulating the abandonment of wells. At the start of its argument, appellant states: "There is some testimony in support of this finding. It all came from the defendant's employees." This acknowledgment is of itself sufficient to dispose of appellant's attack in view of the authorities cited above concerning the conclusiveness of findings of a trial court supported by substantial evidence. In *Menning v. Sourisseau,* 128 Cal. App. 635; 18 Pac. (2d) 77, cited and relied upon by appellant, the District Court of Appeal affirmed the judgment of the trial court reforming a lease as prayed by the defendant in its answer. The unsuccessful plaintiff asserted, as grounds for reversal, that there was a substantial conflict of evidence and that the

findings on reformation were based upon the testimony of the defendant alone. The appellate court rejected such contention as a basis for reversal and said on pages 638 and 639:

"The special defense above set forth was supported in all particulars by defendant's testimony. It is true that it stands unsupported except by some corroborating circumstances, while it was denied by plaintiff's witnesses, but the determination of the conflict was within the province of the trial court.

"His testimony standing alone, uncontradicted, is clear and convincing and this court cannot reverse the judgment of the trial court on the ground that such evidence is contradicted by other evidence. 'The only question which we have to decide in respect to the sufficiency of the evidence, is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a *prima facie* case.' (*Jarnatt v. Cooper,* 59 Cal. 703; see, also, *Roush v. Kirkman,* 42 Cal. App. 115 at 119 (183 Pac. 353).) * * *

"The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in civil cases. (Code Civ. Proc., sec. 1844.) The trial judge or a jury are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number (Code Civ. Proc., sec. 2061). * * *

"Defendant's demeanor on the stand, his appearance and his manner of giving testimony may have been sufficient to convince the trial judge of the defendant's honesty, integrity and the truthfulness of

his testimony. That being true, his testimony alone sustained the burden of proof, overcame the presumption that the written lease embodied the true intent of the parties and justified the trial judge in his conclusion that the plaintiff and his sons did not tell the truth on the stand."

Appellant urges that the testimony of these employees concerning their intention is not to be believed because their statements were made "within the privacy of their employer's office and among themselves" (App. Br. p. 85). This argument again goes only to the weight of the evidence and is answered by *Menning v. Sourisseau* (*supra*). The same is likewise true of the contention on pages 85-89 of appellant's brief that the testimony of these employees is not to be believed because after Richfield's employees had read the contract "no one mentioned the casings or requested that a provision for their exclusion be added to the writing." This latter contention is not truly an attack upon finding No. 8; and if it has any bearing at all, it is pertinent only to appellant's argument concerning negligence in connection with its attack upon finding 29. In the interests of clarity, the argument will be answered as part of the discussion of finding 29 and will not be repeated here.

However, the finding as to the intention of Richfield and of its employees is based not alone on testimony of its employees as to their intention, but is founded largely on other facts and circumstances corroborative of such intention, which facts and circumstances occurred in such

manner that both knowledge and suspicion of Richfield's intention must have been gained by appellant. These include:

(1) The work performed at Casmalia during the summer of 1940 under the Anderson contract [Defendant's Exhibit A, Vol. I, pp. 265-278] at which time the derricks, tubing and rods were removed from the wells which were then capped at the surface in order that they might in the future be opened and re-entered for the production of oil therefrom [Vol. I, p. 91];[13]

(2) The various instances during the negotiations when appellant's representatives, Messrs. Ferer, Clements and Zeidenfeld, were each told that the property to be sold was "surface equipment" [Vol. I, pp. 83-86, 97, 375-384];

(3) The conversation on January 8, 1941, when Davis told Messrs. Clements and Ferer that the six large storage tanks "were not to be sold because the production department wanted to retain them for storage purposes in the event the wells were re-opened" [Vol. I, pp. 229 and 230, 251 and 252, 291];

(4) The conversation during which Davis pointed out to Messrs. Ferer and Clements on a map of the property (a copy of the same map which is attached to the contract) the gas line from the superintend-

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[13]Appellant had knowledge of the performance of this work by Anderson. Clements, who was experienced in the oil business and familiar with the abandonment of oil wells [Vol. II, pp. 786-802, and p. 831], had knowledge of the nature of the work performed by Anderson and knew that the wells had not been abandoned [Vol. II, pp. 766-770].

ent's house to one of the wells on the property, at which time he stated that Richfield desired to exclude such line from the sale in order that the superintendent's house could continue to receive gas from such well, and at which time he stated that it might be necessary to exclude gas lines running to other wells on the property in order to insure a sufficient gas supply to the superintendent's house [Vol. I, pp. 88, 96, 233 and 234]; and

(5) The provision of the contract itself (paragraph 1, subparagraph h) which excludes "gas lines connecting wells on the land above described to the superintendent's house" and the legend in red on the map attached as Exhibit A to the contract, to-wit, "And any extensions of gas line necessary to furnish gas to Duncan's house." [Vol. I, p. 149.]

In commenting on the portion of finding 8 that casing cannot safely be removed from an oil well without complying with the requirement of the California Division of Oil and Gas regulating the abandonment thereof, appellant argues on pages 89 and 90 of its brief that "since the written contract conveyed the casings it must be inferred that defendant intended to comply with the said regulations, if any action by Richfield was necessary. A contract to sell implies a covenant to deliver." This same argument is also made on pages 94 and 99-101 of appellant's brief in connection with findings Nos. 9 and 22, where it is argued that it was Richfield's obligation to abandon the wells. This argument will be answered here.

Appellant's statement is clearly wrong for two independent reasons:

(1) There has been no finding or determination (other than the preliminary opinion of Judge Hollzer concerning which he thereafter expressed doubt)[14] that the written contract conveyed the casing and such a statement merely begs the issue in this litigation.

(2) There could not possibly be any determination that it was Richfield's obligation under the contract to abandon the wells even if the contract did include the casing in the wells within its subject matter. Paragraph 2 of the contract [Vol. I, p. 29] requires the Buyer (appellant) to perform all work in connection with "the dismantling, removal and disposition of all facilities and equipment to be purchased by Buyer hereunder . . .". This provision of the contract was made the basis of the determination by the court below that it would have been *appellant's* obligation under the contract to abandon the wells and that, since appellant never intended to abandon all of the wells and did not understand that it would have any such obligation, there was a mutual mistake which warranted the reformation [See Findings 22, 27 and 28, Vol. I, pp. 153 and 154].

On pages 90-92 of its brief appellant states that the intent of a corporation can be ascertained only through its authorized officers and asserts that although references have been made throughout the testimony to the

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[14]See discussion on pages 15 to 17 of this brief.

Richfield "management" to which recommendations had been made by Mr. Montgomery, "nowhere in the testimony of any witness can be found any information as to what person or group of persons constituted the 'management.'" Both Mr. Kelly [Vol. I, pp. 330-334] and Mr. Montgomery [Vol. II, pp. 467 and 468] testified concerning the weekly executive meetings of Richfield's president and vice-presidents and the heads of the respective departments, at which meetings the policies of the corporation are determined to a large extent.

Finding No. 9. Finding No. 9 concerns the history of the Casmalia oil field during the period from 1917 to 1940, and of the plans of Richfield and its predecessors during that period for the reopening of the field for the production of oil, and the steps taken in furtherance of such plans.

That portion of the Statement of Facts in this brief at pages 5 to 8 sets forth the testimony and evidence in support of this finding, together with appropriate references to the record; and such matters will not be repeated here.

Appellant's attack on finding 9 has no merit, and is limited to a suggestion of fanciful inferences. Appellant points to no conflict of evidence or testimony whatsoever in the record and there is none to be found.

Findings 11, 12, 13, 14, 16, 17 and 21: The court below found that reformation was warranted on two of the grounds provided in California Civil Code, Sec. 3399, to-wit, (a) a mutual mistake, and (2) a mistake on the part of Richfield which was known or suspected by appel-

lant. Findings Nos. 11, 12, 13, 14, 16, 17 and 21 are each separate and individual facts and circumstances on the basis of which the court found in finding No. 10 that the appellant and its employees knew and suspected, prior to and at the time of the execution of the contract, that Richfield did not intend to sell the casing in any of the wells on the Casmalia property or to have any of the wells abandoned. Each of such findings is supported by substantial and compelling evidence and as to most of them, there is not even any conflict of evidence pointed to by appellant.

Appellant's brief states that the facts covered by such findings have been discussed in the portion of appellant's brief devoted to the motion for summary judgment, and would not be repeated. But that portion of appellant's brief necessarily was limited to a discussion of the evidence before the court at the hearing on the motion, to-wit, the affidavits and depositions, and did not discuss the testimony and evidence presented to the court at the trial. Appellant has the duty, in challenging the findings, to point out to this Court the failure or absence of substantial evidence supporting such finding. Appellant wholly fails in such duty and disregards completely all of the testimony and evidence presented to the Court in a trial which occupied several court days. Inasmuch as appellant's attack is so meager, no effort will here be made to prove the sufficiency of each of such findings by references to the testimony and evidence presented to the court at the trial.

Appellant here argues that neither Ferer nor Clements was charged with notice of anything McGahan may have said. This is a reiteration of the contention on page 41

of its brief that "no one intending to buy equipment from Richfield was required to pay attention to the details of a transaction by an employee whose authority extended only to the notification of prospective buyers that property was to be sold."[15] McGahan's authority was not so limited [Vol. I, pp. 376-377]. At the trial appellant did not object to the competence, relevance or materiality of McGahan's testimony that he had told Ferer, Clements and Zeidenfeld that the equipment to be sold was "surface equipment" and appellant cannot raise such objection here. Furthermore, the question of whether or not McGahan had authority to execute the sales contract on Richfield's behalf is unimportant. What is important is that regardless of his lack of authority to execute the contract, he did know what Richfield proposed to sell and had the duty of notifying prospective bidders in that respect and did so notify them that the equipment so to be sold was surface equipment. Under these circumstances, appellant cannot validly claim that it did not receive knowledge or notice of the nature of the property to be sold [Vol. I, pp. 352 and 376-383].

Finding No. 15. The court's finding of the common meaning in the oil industry of the expression "surface equipment," together with its finding that casing in an oil well is not referred to in the industry as "surface equipment," but is commonly referred to as "subsurface equip-

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[15]This contention is wholly at variance with the position taken by appellant concerning a memorandum prepared by Davis who likewise had no authority to execute the written contract on Richfield's behalf. On page 87 of its brief, appellant states: "At this point in the negotiations a statement by Davis was a statement by Richfield."

ment," is clearly supported by the evidence of Davis [Vol. I, pp. 260, 261, 309 and 310], McGahan [Vol. I, pp. 86, 355, 412 and 413] and Montgomery [Vol. II, pp. 488-492].

Appellant's sole attack on this finding is based on an argument that casing may be considered as "production equipment and facilities," notwithstanding that both Montgomery and McGahan testified that casing is not so considered [Vol. I, pp. 410-413, and Vol. II, pp. 488-492]. Appellant's argument is not pertinent. The common meaning of the phrase "surface equipment" was significant because of the knowledge and suspicion of Richfield's intention that McGahan's statements about "surface equipment" gave to appellant. There were no conversations about "production equipment and facilities." While the phrase "producing equipment and facilities" does appear in the recital in the contract [Vol. I, p. 26], the appellant is not here challenging the interpretation of the agreement; and in an action for reformation the court is not confined to an inquiry of what the language of the instrument was intended to be.

California Civil Code, Sec. 3401.

Finding No. 18. Appellant does not challenge finding No. 18, but merely questions its significance. The significance of this finding is the notice that it gave to an interested party on appellant's side of the transaction that Richfield intended not to have the wells abandoned and accordingly, to retain the casing in the wells. As discussed above, Clements was experienced in the oil business, and was familiar with the abandonment of wells, and he knew that in Anderson's work in removing the derricks, tubing and rods from the wells, shortly before the negotiations

for the Ferer contract, the wells were not abandoned. Had Richfield desired to have the wells abandoned, such abandonment could have readily been accomplished as a part of Anderson's work [Vol. II, p. 469].

Finding No. 22. Appellant's argument concerning Richfield's obligation to abandon the wells (App. Br. pp. 99-101) has already been answered on pages 40-41 of this brief.

In addition to determining that the contract was subject to reformation because of a mistake of Richfield which appellant knew and suspected, the court below also determined that reformation was proper because of a mutual mistake of the parties. This mutual mistake is predicated upon (1) the intention of Richfield not to sell the casing in the wells or to have any of such wells abandoned; and (2) the intention of appellant not to abandon all of the wells. Finding 22 must be considered in connection with findings 26 and 27 wherein the trial court found that appellant did not intend to perform the abandonment work on the wells in the manner required by law which would be necessary in connection with the removing of casing therefrom; that appellant did not intend to assume any obligation to Richfield under the contract to perform such abandonment work on the wells; and that appellant did not understand or consider that it would have any such obligation.

Paragraph 2 of the contract provides in part as follows: "Buyer (appellant) agrees at its sole cost and expense to perform the following work . . . Such work shall include the dismantling, removal and disposition of *all* equipment and facilities to be purchased by Buyer

hereunder, as above provided, . . ." [Vol. I, p. 29]. If appellant had intended to purchase the casing in the wells under such contract with the necessary result that the casing would have been part of "*all* equipment and facilities to be purchased by Buyer hereunder," it would have been necessary under such quoted provision of the contract that appellant intend the "dismantling, removal and disposition of *all*" such casing and the abandonment of *all* of the wells on the property. Clements testified that it is necessary to abandon a well in order to remove the casing from it [Vol. II, p. 786].

Appellant, however, did not intend to abandon all of the wells on the property or any specific number of wells. Appellant's intention was to abandon *only such* of the wells in which the quantity of recoverable casing therein would make the abandonment work profitable. Findings 22, 26 and 27 are amply supported by the evidence. Clements testified: "There were certain wells we might not be able to abandon for the reason they might be of such a nature they would cost you more to abandon them than to leave them alone, in which case we were going to leave those alone that wouldn't show any profit." He also testified that they were only guessing how many wells would be profitable and they would not know which were profitable until they had opened up the holes. [Vol. II, pp. 795 and 796]. Clements and Ferer discussed the matter of abandonment on the occasion of their visit to the Casmalia property prior to December 10, 1940, the date of appellant's written offer to Richfield [Vol. II, pp. 799 and 800]. They considered that it would be desirable to abandon some wells and not others and that there would be some wells which would have a minimum of casing

which would not prove very profitable [Vol. II, pp. 801-803]. None of this was ever discussed with Richfield or any of Richfield's representatives and neither Ferer nor Clements ever stated to Richfield their intention of abandoning only part of the wells and not abandoning others [Vol. II, pp. 802 and 806].

Clements testified that they did not intend to assume any contractual obligation to abandon any one or more of the wells [Vol. II, pp. 802-807].

On pages 99 and 100 of its brief, appellant attempts to distort the language of finding 22 to give it a meaning that appellant misunderstood the provisions of the contract. An examination of finding 22 in connection with findings 26 and 27 and in the light of the evidence referred to above discloses quite clearly that while appellant understood its obligation under the contract to dismantle, remove and dispose of all equipment and facilities, it did not intend that this obligation would apply to or include the abandonment of the wells. In this connection, the language of this Court in *Clyde Equipment Co. v. Fiorito,* 16 Fed. (2d) 106, C. C. A. 9, 1926, is pertinent:

> "If a finding is susceptible of two constructions, one of which supports the judgment and the other does not, the former will prevail; and whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn. The findings of fact by a trial court must receive such a construction as will uphold, rather than defeat, its judgment. (*Burleigh v. Consumers Publishing Co.,* 95 Wash. 50, 51, 163 P. 5; *Breeze v. Brooks,* 97 Cal. 72, 31 P. 742, 22 L. R. A. 256."

Appellant attempts to escape the compelling effect of this evidence of appellant's intentions by contending, first, that the foregoing testimony of Clements related to a time when the deal was still in the embryonic stage and before actual negotiations had begun, and second, that Ferer's intentions concerning the abandonment of the well were different from those to which Clements testified (App. Br. pp. 102 and 103).

As regards the first excuse, the testimony appearing on pages 797 and 806 and 807 of Volume II shows most emphatically that Clements' statements related not only to the time of inspection of the property by Ferer and Clements, but also to the time of the execution of the contract when the provisions of the contract were before him. The contract was not drafted until the second week of January, 1941, and their inspection occurred early in December of 1940. Indeed, Clements' testimony at the places mentioned reveals that the absence of an assumption of any obligation remained as his intention at the time of the taking of the deposition, over a year after the date of the contract. On page 102 of its brief, appellant quotes a statement of Clements as indicating an intention to abandon the wells different from that to which he had formerly testified; but an examination of the record [Vol. II, p. 807] reveals that the statement so quoted was an answer given by Clements at his deposition in response to a question expressly limited to the matter of cleaning up the surface of the property.

As regards the second excuse, Ferer's testimony as to his understanding of the obligations of the contract concerning the abandonment of the wells may be disregarded for the reason that he had testified that he was inexperi-

enced in transactions of this nature and that he intended to leave to Clements the matter of the abandonment of the wells [Vol. II, p. 878]. The utmost that can be said from appellant's standpoint is that the evidence is conflicting; and as a result, the finding must stand.

Finding No. 29. On pages 103-107 of its brief appellant challenges the finding that the mistake was not caused by or the result of negligence of Richfield. In addition to the authorities cited on pages 32 to 35 of this brief concerning the conclusiveness of findings of the trial court, the court's attention is called to the following cases where the finding of the trial court that the party seeking reformation was not negligent was affirmed by the appellate court:

Los Angeles Co. v. New Liverpool Co., 150 Cal. 21, 25-28; 87 Pac. 1029;

Sullivan v. Moorehead, 99 Cal. 157, 160 and 161; 33 Pac. 796;

Seim v. Cooper, 79 Cal. App. 748, at pp. 754 and 755; 250 Pac. 1106;

Columbian National Life Insurance Co. v. Black, 35 Fed. (2d) 571, at p. 575, C. C. A. 10, cited in appellant's brief.

In *Hanlon v. Western Loan & Bldg. Co.,* 46 Cal. App. (2d) 580; 116 Pac. (2d) 465, the court said on pages 597 and 598:

> "Appellants contend that the loan company was negligent in preparing and in not reading and discovering the mistake in the description; that in such circumstances there is no right of reformation; that the mistake must occur without fault or negligence of

the party who complains of it. That is not a correct statement of the law. It is true that there are cases denying reformation where the person seeking that relief was negligent. (See cases collected and commented on in *California Trust Co. v. Cohn*, 214 Cal. 619 (7 Pac. (2d) 297).) But there are other cases holding that failure to read a contract does not necessarily prevent a reformation. (See *Los Angeles & R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21 (87 Pac. 1029); *Travelli v. Bowman*, 150 Cal. 587 (89 Pac. 347); *Cantlay v. Olds & Stoller Enter-Exch.*, 119 Cal. App. 605 (7 Pac. (2d) 395).) *Whether the failure to discover the defective description was the result of inexcusable negligence, so as to preclude relief by way of reformation, or, whether the failure to discover the error was the result of excusable neglect, is a question of fact, the determination of which rests largely in the discretion of the trial court.*" (Emphasis ours.)

With intemperate and reckless language of fraud, appellant charges Richfield's employees with gross negligence: first, in signing an agreement which did not expressly provide that the casing in the wells was excluded: and second, in not stating expressly to appellant that the casing was excluded.

The failure of the contract expressly to exclude the casing is a matter not of negligence, but was the mistake itself, as stated by the court below in finding No. 29. It is to be noted that although the contract contains a list of many items included within the subject matter of the sale, to-wit, "pipe-lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, metal and lumber now located on said land . . .," there is no mention

of casing; and a reading of such list by a person signing the contract would not of itself call to his attention the fact that it might be claimed by the other party to the contract that the casing was included in the subject matter. Kelly signed the contract on behalf of Richfield. He testified as to his intention not to sell the casing [Vol. I, pp. 89 and 90]; and he also testified concerning his understanding of the phrase "metal and lumber" appearing in such list [Vol. I, p. 92]. Montgomery approved the contract before it was signed by Kelly. He also testified concerning his intention that the wells be not abandoned and that the casing not be removed; and he testified further that he would not have approved the contract had there been any provision therein for the abandonment of the wells or the removal of any of the casing therefrom [Vol. II, pp. 475 and 480-481].

Any failure of Richfield's employees not to mention expressly in conversation that the casing was to be excluded or that the sale was limited to "subsurface equipment" is no proof of negligence and is readily explained: first, by the fact that all of the persons representing appellant, Ferer, Clements and Zeidenfeld, had been told that the subject matter of the sale was "surface equipment" and accordingly, there was no occasion or necessity to reiterate the matter; and second, by the fact that all of the items of equipment discussed in the conversations consisted of surface equipment.

On the other hand, the evidence before the court would well have justified an express finding of negligence on

the part of appellant in making no inquiry concerning the casing. The matters constituting appellant's negligence are covered in findings Nos. 11, 12, 13, 14, 16, 18, 19 and 20. Finding No. 11 relates to the conversation at which Messrs. Ferer and Clements heard Davis say that Richfield intended to use the wells on the Casmalia property for the future production of oil and for that reason declined to include the six large storage tanks. Finding No. 12 relates to the conversation at which it was explained to Ferer and Clements that gas lines to one or more wells on the property were excluded in order to insure sufficient gas supplies to the superintendent's house. Findings Nos. 13, 14 and 16 relate to the conversations at which Clements, Ferer and Zeidenfeld were told that the equipment to be sold was "surface equipment." Finding No. 18 relates to the information obtained by Clements that in Anderson's work in removing the derricks, tubing and rods from the wells, the same were not abandoned. Appellant's brief is significantly silent concerning findings Nos. 19 and 20 wherein the court found that although Ferer and Clements visited Casmalia prior to the execution of the contract, and made a visual inspection of the surface equipment thereon, neither they nor any one else on appellant's behalf made any inspection to ascertain the length or the size or the weight or the condition of the casing in the oil wells. The court found further that at the time of executing the contract, appellant was not informed concerning the number of the wells or the length, size, weight, or condition of the

casing, and that appellant had not ascertained or secured any estimate of the cost of abandoning any such wells. It was further found that at the time of executing the contract appellant did not know and made no effort to ascertain whether the condition of any of the wells was such that the cost of abandoning the same would exceed the value of any salvage recoverable by abandonment. The court found also that at no time prior to the execution of the contract was any inquiry made by or on behalf of appellant of the California Division of Oil and Gas respecting what requirements and regulations must be complied with in the matter of abandoning any wells or removing any casing from any wells at Casmalia and that at the time of executing the contract appellant did not know what such requirements or regulations were. Such findings are fully supported by the depositions of Messrs. Ferer and Clements [Vol. II, pp. 755, 764-772, 787-788, 849-851, 865-866, 880-883, 889-890, 897, 900 and 913].

That such matters constituted negligence on appellant's part is particularly clear when viewed in the light of finding No. 21 wherein the court found that at no time during the negotiations antecedent to the execution of the contract or at the time of its execution, was there any discussion or mention between appellant or its employees or representatives and Richfield or its employees or representatives of abandoning any of the wells at Casmalia or removing any casing therefrom. [Vol. I, pp. 152 and 153.]

Under these circumstances, the language of the court in *Metropolitan Casualty Ins. Co. v. Stone,* 124 Cal. App. 430, at page 437; 12 Pac. (2d) 665, is particularly pertinent:

> "The defendants contend that the plaintiff should not be given any relief because the mistake, if any, arose by reason of the plaintiff's negligence. To that contention there are two answers. In the first place the trial court made no finding that the plaintiff was guilty of negligence. (*Mahoney v. Standard Gas Engine Co.,* 187 Cal. 399, 407 (202 Pac. 146).) In the second place there is some evidence that when the bond was originally discussed these defendants were to be required to execute it; that thereafter it appeared the better plan was to act through the Pacific Corporation Company and that the fault in the execution of the indemnity contract, if any, was as much the neglect of the defendants as it was of the plaintiff."

Finding No. 30. Appellant challenges finding No. 30 wherein the court stated that in view of its finding concerning reformation, it was unnecessary to make any finding concerning the proper construction or interpretation of the written contract either on its face or in the light of surrounding circumstances.

Such finding was eminently proper. Notwithstanding that the interpretation of the contract was an issue which had not theretofore been determined,[16] the relief of reformation granted to appellee rendered unnecessary any determination by the court below of the issue of interpretation.

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[16]See footnotes 6 and 7 of this brief.

V.

The Proper Construction and Interpretation of the Contract in the Light of Surrounding Circumstances Is That the Subject Matter Thereof Was Limited to Equipment and Facilities Located on the Surface of the Land and Did Not Include the Casing in Any of the Oil Wells.

Appellee contended in the lower court and contends here that the proper interpretation of the contract in the light of the circumstances attending and leading up to its execution is that the subject matter thereof was limited to the equipment and facilities located on the surface of the land and does not include the casing in any of the wells. This proposition of interpretation, which was the issue created by appellant's complaint and Richfield's answer thereto, must be decided only if this Court determines that the judgment of reformation cannot be sustained.

To outline briefly the matters hereinafter discussed, it will be shown: First, that the contract is not, as asserted by appellant, clear and unambiguous in including the casing in the subject matter thereof and accordingly, that parol evidence is proper as an aid to interpretation; second, that an interpretation that the subject matter included the casing would be contrary to the intention of both parties and that such an interpretation would violate statutory rules of construction; and third, that the parol evidence offered clearly compels an interpretation that the subject matter excluded the casing.

(1) It cannot be asserted seriously that the contract is clear and unambiguous as to the inclusion of the casing. The contract does not use the word "casing" in the list of the types of equipment to be sold. Such list contained

in paragraph 1 of the contract is explicit and no mention of casing or pipe can be found therein. If for purposes of discussion it can be assumed that either the phrase "producing facilities and equipment"[17] or the phrase "metal and lumber" is broad enough to include the casing in the wells, various ambiguities and contradictions are immediately apparent on the face of the contract:

(a) All references in the contract to the subject matter are of equipment "on the land" and are not, as appellant's asserted interpretation of the contract would have it read, of equipment "on and *in* and *under* the land." The contract repeatedly uses the phrases "now located *on* said land." The deliberate use throughout the contract of the word "on" demonstrates an intention to limit the facilities and equipment to be sold to those of surface equipment and to exclude subsurface equipment. The rules governing the interpretation of words and phrases used in a contract are governed by Cal. Civ. Code Secs. 1638 and 1644. In *Riser v. Federal Life Insurance Co.*, 224 N. W. 67 (Iowa), the Court said on page 68: "The prepositions 'in' and 'on', when used to designate location are never synonymous. 'In' means 'within—the interior.' 'On' means 'upon—the surface.'"

Rester v. Moody & Stewart, 134 So. 690 (La. 1939);

Ruckert v. Grand Ave. Ry. Co., 63 S. W. 814, 818 (Mo. 1901).

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[17]This phrase is found in a recital of the agreement and does not appear in paragraph 1, where the list of equipment is set forth.

(b) A second contradiction would result when application is made of the accepted rule of construction known as *"Expressio unius est exclusio alterius,"* to-wit, that the express mention of certain items results in the exclusion of others not mentioned.

California Civil Code, Sec. 1656;

California Civil Code, Sec. 3534;

California Code of Civil Procedure, Sec. 1859;

Scudder v. Perce, 159 Cal. 429, 114 Pac. 571;

Van Loben Sels v. Producers Fruit Company, 36 Cal. App. 201, 179 Pac. 403;

Quisle v. Bresner, 180 N. W. 467, at pp. 468 and 469 (Mich. 1920);

Scanlan v. Houston Lighting & Power Co., 62 S. W. (2d) 537, at p. 540 (Texas 1933);

Henne v. Summers, 16 Cal. App. 67, 71, 116 Pac. 86;

Denver Joint Stock Land Bank v. Markham, 107 Pac. (2d) 313, 316;

Wm. Lindeke Land Co. v. Kalman, 252 N. W. 650, 652 (Minn. 1934);

In re Barnett's Trusteeship, 251 N. W. 59, 60 (Iowa 1933).

In *Althoff Mfg. Co. v. Althoff,* 123 Pac. 326 (Colo. 1912), the contract provided:

". . .. all the assets, real and personal, of said firm or standing in our name and now a part of the property of Althoff & Son. An inventory of said property has been made and is found in that certain Book marked . . . for identification and which

we surrender to you for better description of said property. The property proposed to be sold includes good will, all leases, outstanding monies, accounts, all contracts, policies of insurance, claims and choses in action, patents and patentable ideas, or inventions incident to the business for which your company as a manufacturing corporation has been created, whether included in said inventory or not, and all things in general owned or used by said firm in the conduct of its business at said #1411-15 Wazee Street."

Notwithstanding the all-inclusive list of items to be sold as stated in the contract, the court held that the sale of all the assets of the copartnership did not include certain stock of a corporation of the value of $16,000 which the copartnership had received during the year preceding the sales agreement in the course of its business. In so holding that the stock was excluded from the sale, the court said on page 328:

". . . If this stock had in fact been sold by the defendants and bought by the plaintiff, it is manifest that its existence would have been known to it, constituting a part of the consideration of the purchase and sale, and it would have been specifically mentioned in the agreement, being an item of such great importance and value compared with the total amount involved in the transaction."

In *Barnett v. Logan*, 10 S. W. 440 (Mo. 1919), the description in the bill of sale was as follows:

"The same to include all machinery and equipment used in connection with said mill."

The Court applied the rule of construction referred to above and held that the sale did not include a particular motor which was not specified in an inventory attached to the bill of sale. In so holding the Court said on page 442:

"The inventory, although containing 68 separate and specific items, makes no mention of the motor, though it was of much more value than a number of items specified . . ."

(c) One of the express exceptions in the contract from the equipment to be sold is "(h) gas pipe lines connecting wells on the land above described to the superintendent's house PR.-1494." (Paragraph 1 of the contract.) The map attached as Exhibit A to the contract contains the following legend in red:

"And any extensions of gas lines necessary to furnish gas to Duncan's house."

The apparent purpose of this provision to provide for future transportation of gas from the wells to the superintendent's house would be defeated by any abandonment of the wells which would render impossible any future production of gas. A repugnancy would therefore result from any interpretation that the subject matter included the casing in the wells.

California Civ. Code, Sec. 1652;
California Civ. Code, Sec. 1648;
California Code of Civil Procedure, Sec. 1858.

Such ambiguities, contradictions and repugnancies which would result from an interpretation that the contract included the casing, permit the introduction of parol evidence concerning the surrounding circumstances and

the intention of the parties. This is so clear under the law of California, that no citation of authority is necessary other than reference to Cal. Civ. Code, Sec. 1647, and Cal. Code of Civil Procedure, Sec. 1860.

All of the evidence before the trial court was offered on the issues of both the interpretation of the contract and the reformation thereof [Vol. I, pp. 187 and 253], and no objection to such introduction of evidence on the question of interpretation was ever made by appellant. The court below stated that the evidence was to be considered on both issues. [Vol. II, p. 496.]

(2) Any interpretation that the subject matter includes the casing would be contrary to the intention of both parties to the contract and would violate statutory provisions concerning the construction of contracts.

California Civil Code, Sec. 1636;

California Civil Code, Sec. 1643;

California Civil Code, Sec. 1648.

The court below found that neither of the parties to the contract intended that the casing in the wells was to be included in the subject matter thereof (findings 10, 22, 23, 26 and 27). The sufficiency of the evidence to sustain such findings has been thoroughly discussed in other portions of this brief, at pages 46 to 50.

(3) The testimony and evidence of the circumstances surrounding the negotiations and execution of the contract, including the intention of the parties thereto, has been discussed in detail in the preceding portions of this brief in connection with the propriety of the decree of reformation.

Appellee respectfully submits that the proper interpretation of such contract in the light of such surrounding circumstances, is that the subject matter was limited to surface equipment and did not include the casing.

Appellant's contention before the trial court that the language of the contract required an interpretation that the subject matter included the casing was based upon the following phrases in the contract: (1) "various refinery and producing facilities and equipment"[18] and (2) "metal and lumber."[19] Neither of these phrases is in any way inconsistent with an interpretation that the equipment to be sold did not include the casing.

While the trial court made no specific finding on the matter, there was sufficient evidence that casing installed in oil wells is not encompassed by the phrase "producing facilities and equipment" in the common meaning of such phrase in the oil industry [Vol. I, pp. 410-414; Vol. II, pp. 491-494]. Likewise, there was sufficient evidence that the phrase "metal and lumber" was not intended to refer to the casing in the wells, but was inserted in the contract for the purpose of identifying various items of loose metal scattered about the surface of the property

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[18]This phrase is contained in the opening recital, to-wit, "Whereas, Seller is the owner of a certain parcel of real property in Santa Barbara County, California . . . on which parcel of property are located various refinery and producing facilities and equipment, and . . ." [Vol. I, p. 26.]

[19]This phrase is used following the list of equipment in paragraph No. 1 of the contract.

which were not specifically enumerated in the list of equipment set forth in paragraph 1 of the contract [Vol. I, pp. 86, 87, 92, 94 and 95].

It should be noted that appellant's offer of December 10, 1940 [Plaintiff's Exhibit 2, Vol. I, pp. 215 and 216], which is one of the preliminary memoranda upon which appellant has placed so much reliance in its brief, and which offer was made subsequent to the inspection of the Casmalia property by Ferer and Clements, contains no mention of "producing equipment or facilities."[20]

Conclusion.

In conclusion, we respectfully submit that the judgment below rendered for appellee should be affirmed. The rulings of the trial court in sustaining appellee's motion to dismiss the first cause of action of the complaint and in denying appellant's motion for summary judgment were clearly correct, and in any event caused no prejudice to appellant. The judgment of the court below reforming the contract to make it expressly provide that the casing in the wells was excluded from the equipment and facilities to be sold thereunder and that appellant had no obligation as a part of its work under the contract to abandon said wells or remove any casing therefrom was clearly correct upon two of the grounds specified in Cal. Civ. Code, Sec.

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[20]In appellant's offer the equipment is described as "all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property."

3399. The failure of the contract to provide for such express exclusion resulted both from a mutual mistake and a mistake of appellee of which appellant both knew and suspected.

Appellee submits further that even if the decree of reformation of the lower court be determined to have been incorrect, nevertheless the contract properly interpreted excludes the casing from the subject matter thereof.

It is our earnest conviction that the evidence and the law require that the judgment of the court below be affirmed.

Respectfully submitted,

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